



COUNCIL AGENDA: 06-10-08
ITEM:

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Tom Manheim
Director of Communications

SUBJECT: SEE BELOW

DATE: May 12, 2008

Approved

Christine F. Shipp

Date

5-16-08

**SUBJECT: RULES AND OPEN GOVERNMENT COMMITTEE'S
RECOMMENDATIONS ON THE SUNSHINE REFORM TASK FORCE'S
REMAINING PHASE I PROVISIONS**

RECOMMENDATION:

- 1) Approve the Sunshine Reform Task Force Recommendations on Public Meetings as amended by the Rules and Open Government Committee and direct staff to proceed with implementation on a pilot basis;
- 2) Approve staff recommendations on the definition of Agenda and Public Review File and direct staff to proceed with implementation on a pilot basis;
- 3) Approve the Sunshine Reform Task Force Recommendations on Closed Session as amended by the Rules and Open Government Committee and direct staff to proceed with implementation on a pilot basis;
- 4) Approve a minor amendment to the Calendar Disclosure requirements approved by the Council in August 2007; and
- 5) Discuss and decide whether to record Closed Session.

OUTCOME

Approval of the Sunshine Reform Task Force provisions on Public Meetings and Closed Session as amended by Rules and Open Government Committee (ROGC) will allow staff to:

(1) implement the Public Meetings provisions on a pilot basis for the City Council and Board of the Redevelopment Agency, Council Committees, Decision-Making Bodies, Boards, Committees and Commissions, and Other Advisory Entities; and (2) implement the Closed Session provisions on a pilot basis for the 6 other bodies permitted to hold closed session.

EXECUTIVE SUMMARY

The Phase I/Part II Sunshine Reform recommendations govern the conduct of the numerous entities that conduct the Public's business. The goal of the recommendations is to create increased transparency and facilitate public awareness and participation in the governing process. All of the recommendations have been reviewed by the Rules and Open Government Committee,

along with feedback from the affected entities and the City administration. The final ROGC recommendations are discussed below. In all cases the ROGC recommendations are consistent with the Task Force intent and substantially exceed the Brown Act requirements. In the cases where the ROGC modified the SRTF recommendations, the Committee's intent is to balance the competing goals of openness and transparency with efficiency and effective government.

The recommendations would establish new requirements for the following entities: 1) City Council; 2) Board of the Redevelopment Agency; 3) City Council Committees; 4) City Boards, Commissions and Committees; and, 5) Other Advisory Entities. Additional requirements for certain non-governmental entities were considered, however the ROGC recommended referring these requirements to the Non-Profit Strategic Engagement Group.

The requirements address the following areas:

1. What information and documents should be included with agendas;
2. Deadlines for distributing:
 - a. staff reports
 - b. staff reports on expenditures of \$1m or more
 - c. staff reports containing cost/benefit analyses of a Public Subsidy of \$1m or more
 - d. Supplemental Staff Reports
3. Deadlines for distributing memos signed by Councilmembers and in the case of other entities, member(s) of that other body
4. Deadlines for posting agendas for Special Meetings
5. Video and Audio Recording requirements
6. Public Testimony
7. Meeting Minutes

The SRTF also made numerous recommendations regarding the conduct of closed session meetings. If approved by the City Council, these requirements would apply to the 8 entities that are permitted to hold closed session. ROGC addressed all of the SRTF recommendations with one significant exception. The decision of whether to record closed session is being brought to Council in this report with no recommendation from the ROGC. Both the City Attorney and the City Administration have recommended against recording closed sessions.

BACKGROUND

In May 2007 the Sunshine Reform Task Force (SRTF) issued its Phase I Report and Recommendations on: (1) Public Meetings; (2) Closed Sessions; and (3) Public Information and Outreach. The Rules and Open Government Committee (ROGC) reviewed and discussed the SRTF's Phase I recommendations, staff's preliminary response, and the Mayor's recommendations in May and June 2007. The ROGC completed its review of the Public Information and Closed Session provisions and directed staff to seek additional input from entities impacted by the Public Meetings recommendations. Staff solicited additional input on these provisions from the many boards, committees and commissions and outside organizations

that would be impacted by the recommendations. From October 2007 through April 2008 the ROGC reviewed the remaining SRTF Phase I recommendations on the following topics:

- Terminology and Definitions of Categories of Impacted Entities
- Public Meeting Requirements;
- Requirements for Non-Governmental Bodies; and
- Closed Session Requirements.

The ROGC considered current practices and heard testimony from the affected entities and City staff about the practical impacts of the recommendations. The Chair of the Task Force and other Task Force members also provided input on the Task Force's intent for specific recommendations. As needed, the Committee directed staff to conduct additional analysis. The ROGC's recommendations are discussed below.

ANALYSIS

Note on "Open Government" Nomenclature. For purposes of clarity, staff would like to briefly note that the terminology used to refer to the overall body of work and the specific products of the SRTF will increasingly reference the term "Open Government." This is consistent with the terminology used by other cities and the Task Force itself to name the specific results of its work: *Open Government* ordinance, commission, and officer, as examples. The body of this report will use this term and as the organization continues to implement the approved recommendations, staff will increasingly use "Open Government" as opposed to continuing references to "Sunshine Reform."

A. TERMINOLOGY AND DEFINITIONS OF CATEGORIES OF ENTITIES

For purposes of clarity and consistency, the ROGC chose to apply the terms most commonly used in the City organization for the numerous entities impacted by the Sunshine Reform Task Force's recommendations, rather than use the terms "Policy Body" and "Ancillary Body" as recommended by the Task Force. The ROGC considered these entities in the following groupings: (1) San Jose City Council and the Board of the San Jose Redevelopment Agency; (2) City Council Committees; (3) Decision-Making (Quasi-Judicial) Bodies; (4) City Boards, Committees and Commissions; (5) Other Advisory Entities; and (6) Non-Governmental Bodies. While the ROGC used different groupings, all of the entities identified by the SRTF were reviewed. **Attachment A** provides definitions for and lists the groups of entities as considered by the ROGC and to which the Public Meetings requirements are intended to apply.

The term "Decision-Making (Quasi-Judicial) Bodies" is used to identify those bodies that act like courts when they receive evidence and make final decisions about matters that cannot be appealed to any other City body. What makes these bodies unique from the other City Boards, Committees and Commissions is that each operates under unique regulations set forth in local, state and/or federal law for vastly different purposes.

The term "Other Advisory Entities" was used by ROGC as an umbrella term to refer to entities identified by the SRTF including standing committees of Boards, Committees and Commissions, and a broader group of entities that are formed to advise the Mayor, Councilmember, Council Appointees and others on the conduct of the public's business. This term is fully defined and outlined in Attachment A.

Definition of Agenda Packet

In its review of Public Meeting requirements (discussed below), the ROGC discussed what should be included in the agenda packet; **Attachment B** shows the final definition approved by the ROGC. Under this definition, an agenda packet will continue to include staff memoranda (with some exceptions) but will also include contracts, ordinances and resolutions in substantially final form. While this change from current practice is a best practice in many other cities, it may delay the consideration of some items to allow the inclusion of the additional documents. The approved definition would apply to all City departments and entities affected by the final recommendations.

Definition of Agenda

Listing the Proposed Action for each agenda item. In the Sunshine Reform Task Force Phase I Report, the definition of Agenda specifies that the "proposed action for each item" be listed on the agenda. The ROGC agreed with the Task Force except in the case of Decision-Making Bodies. The ROGC recommends that Decision-Making Bodies NOT post the proposed action for each item on an agenda when the body is making a decision at a hearing based on evidence presented at the hearing. Listing "proposed action" on the agenda would be contrary to the neutrality of the entity.

Listing all documents associated with each agenda item. In the SRTF Phase I Report, the definition of Agenda also specifies the inclusion of "a list of documents that have been or will be provided to the policy body in connection with each item." Staff proposes that the City Council agendas posted on the City's website contain a link to all of the documents referenced or distributed to Council members, but that the printed agendas not list the document since doing so would substantially increase the length of the printed Council agendas. Staff also proposes that the same protocol of linking associated documents with the online agenda but not the printed version of the agenda, be extended to all the entities affected by the Public Meetings Provisions. In addition, the ROGC recommends that Decision-Making (Quasi-Judicial) Bodies be required to list and link all of the documents *available to them at the time the agenda is posted*, recognizing that in many cases evidentiary documents are presented at the time of the meeting.

Amending Agendas

Staff recommended and the ROGC accepted two additional provisions about the Council agenda. First, ROGC approved authorization for the City Clerk to make administrative and clerical changes to Council agendas to avoid unnecessary delays in hearing items. Specifically, no later than the 3 days before a regular meeting, the City Clerk may post an amended agenda. Second, after an amended agenda has been posted, the City Clerk, in consultation with the Mayor, City

Attorney, City Manager and/or Executive Director of the San Jose Redevelopment Agency, may add an item to the Agenda under Orders of the Day. The added item must be posted along with the agenda and amended agenda with an explanation as to why the item is being added. The Council may consider the item only when it makes a good faith, reasonable determination by a two-thirds vote of the body, or if less than two-thirds of the members are present, a unanimous vote of those present, that the item must be resolved at that meeting.

Public Review File

The SRTF recommends that the Office of the City Clerk maintain a central public review file for all communications with not only the City Council, Board of the San Jose Redevelopment Agency and Council Committees, but also all the Decision-Making Bodies and Boards, Committees and Commissions. ROGC agreed with staff's recommendation that public review files for the Council, the Redevelopment Agency, Council Committees, Decision-Making Bodies, and Boards, Committees and Commissions be maintained by and located in the individual departments that support each respective body. Since the Clerk's Office is a central point for City records, however, it is also recommended that the Clerk's Office maintain a directory of the location of the public files in the City organization. Any customer who contacts the Clerk's Office seeking a public review file for a specific entity can be directed to the correct department.

Calendar Disclosure

The ROGC reviewed language governing the disclosure of calendars in the Public Information provisions approved by Council in August 2007 and clarified that online calendars should remain available for 13 weeks.

B. PUBLIC MEETING REQUIREMENTS

The Task Force considered all aspects of public meetings in its effort to provide more openness and transparency in the workings of City government, and staff has organized the recommendations into the following list of ten Meeting Requirements:

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|--|--------------------------------------|
| 1. Agenda Posting (Regular Meetings) | 5. Supplemental Staff Reports |
| 2. Staff Reports | 6. Memos from Member(s) of the Body |
| 3. Staff Reports with Expenditures of \$1M or more | 7. Agenda Posting (Special Meetings) |
| 4. Cost/Benefit Evaluation of Public Subsidies of \$1M or more | 8. Video and Audio Recording |
| | 9. Public Testimony |
| | 10. Meeting Minutes |

A comprehensive matrix has been developed listing the meeting requirements and the ROGC's recommendations for all of the categories of entities affected (**Attachment C.**) In some areas the ROGC recommended modifications to the SRTF recommendations to balance the competing goals of openness and transparency with efficiency. The next section of this report discusses the

meeting requirements and provides tables that detail the ROGC recommendations for the affected entities.

Posting of Agendas and Staff Reports for Regular Meetings (Table 1)

The SRTF recommended 10 days advanced noticing for all categories of meetings except *Other Advisory Entities*, for which it recommended 4 days advance noticing.

City Council and Board of the San Jose Redevelopment Agency (SJRA). The ROGC accepted the SRTF recommendations of 10 days advance posting of Agendas and Staff Reports. This is consistent with current practice and significantly increases notice to the public beyond the minimum posting requirements specified in the Brown Act (3 days.) However, in an effort to balance the increased noticing time with the need for effective administration, the ROGC recommends permitting exceptions to the noticing requirements if the exception is approved by the ROGC and is otherwise consistent with Brown Act noticing requirements.

Council Committees. The ROGC recommends that the current practice of 7 days advance posting for all Committees and 5 days advance posting for the ROGC be maintained as it is consistent with the goals of increasing notice to the public. Items moving through the reporting process from a Council Committee and then to the Council Agenda will have at least 17 days of notice (7 days for the Committee meeting posting plus 10 days for City Council posting.)

Decision-Making Bodies and Boards, Committees and Commissions. The ROGC recommends a 7-day posting requirement. As a result, items moving through the reporting process from a Board, Committee or Commission to a Council Committee and then to the Council Agenda will have at least 24 days of notice (7 days for the Board meeting posting plus 7 days for Council Committee posting plus 10 days for City Council meeting posting.) The ROGC also recommends allowing amended agendas for Decision-Making Bodies if posted within 3 days (consistent with the Brown Act.) This addresses the need for Decision-Making Bodies to quickly address urgent issues that may arise. The ROGC further recommends that Standing Committees of Boards, Committees and Commissions (Other Advisory Entities – defined in attachment A) follow the Brown Act, by posting agendas 3 days in advance.

Table 1: Posting Requirements for Agendas and Staff Reports for Regular Meetings

Meeting Requirements	Council and RDA	Council Committees	Decision-Making Bodies	Boards Committees Commissions	Other Advisory Entities
1. Agenda Posting (Regular Meeting)	10 days; exceptions may be requested from Rules if within Brown Act	7 days 5 days for Rules	7 days Amended agenda allowed if within Brown Act	7 days	3 days
2. Staff Reports	Same as Above.	Same as Above.	7 days	7 days	No posting requirement.

Posting of Staff Reports with Expenditures of \$1M or More and Posting of Reports with a Cost Benefit Evaluation of a Public Subsidy of \$1M or More (Table 2)

Council and Board of the SJRA. The ROGC accepted the Task Force's recommendation for advance posting of Staff Reports with expenditures of \$1M or more (14 days.) This deadline is consistent with the City's current practice and significantly increases notice to the public beyond the minimum posting requirements specified in the Brown Act (3 days.) For Cost/Benefit Evaluations of a Public Subsidy of \$1M or more, the ROGC changed the noticing recommendation while trying to stay consistent with the intent of the Task Force. The SRTF recommended a 30-day noticing requirement. The ROGC recommends that an informational memo be posted 28 days in advance and that the Staff Report be posted 14 days in advance. This timeline addresses the Task Force's intent of providing extended notice for these items and the 14-day requirement is consistent with the posting deadline for Staff Reports with Expenditures of \$1M or more. If the Council approves this recommendation, the ongoing Cost-Benefit Pilot Program would continue to use the new noticing requirements.

Council Committees, and Boards, Committees and Commissions The ROGC recommends that for Staff Reports with Expenditures of \$1M or more and Cost Benefit Evaluations of Public Subsidies of \$1M or more, the current practice of 7 days advance posting for all Council Committees and 5 days advance posting for the ROGC be continued. Similarly, the Committee recommends a consistent 7-day posting deadline for Boards, Committees and Commissions. These posting timelines will provide public notice of at least 17 or 24 days (7 days for the Board posting, 7 days for Council Committee posting, 10 days for Council posting.)

Table 2: Posting Requirements for Staff Reports with Expenditures of \$1M or more and for Cost Benefit Evaluations of a Public Subsidy of \$1M or more

Meeting Requirements	Council and RDA	Council Committees	Decision-Making Bodies (Quasi-Judicial)	Boards, Committees Commissions	Other Advisory Entities
3. Staff Reports Expenditures of \$1M or More	14 days; exceptions may be requested from Rules if within 10 days	7 days; 5 days for Rules	NA	7 days	NA
4. Cost Benefit of Public Subsidy (\$1M or More)	Info Memo 28 days; Staff Reports 14 days	7 days; 5 days for Rules	NA	7 days	NA

Supplemental Staff Reports (Table 3)

Council and Board of the SJRA. The ROGC did not accept the Task Force recommendation requiring 5-day advance posting of all supplemental staff reports, but instead recommends maintaining the current practice of allowing supplemental memos at any time as long as they are informational in nature and do not contain “substantive changes.” The ROGC recommends that Supplemental Staff Reports that contain “substantive changes” be added to a meeting agenda only with the approval of the ROGC (consistent with exceptions permitted for posting agendas/staff reports) and if within the 3 days required by the Brown Act. It should be noted that in practice, since the ROGC currently meets 6 days prior to a City Council meeting, the resulting notice for supplemental memos containing substantive changes will actually be 6 days.

Council Committees and Boards, Committees and Commissions. The ROGC recommendations regarding supplemental memos for the above entities are consistent with its approach for the City Council and Redevelopment Agency. Rather than 5 days advance posting for Supplemental Staff Reports, the ROGC recommends maintaining the current practice of allowing supplemental memos that are informational in nature at any time. In addition, however, Supplemental Staff Reports that contain “substantive changes” may be added to a meeting agenda with 3 days notice, which is consistent with the noticing requirements of the Brown Act. The entity would then determine, before actually considering the item, whether the item should be heard or deferred. If the entity determines that the amount of notice to the public is appropriate for the supplemental report, it may choose to hear and act upon the item; if the entity determines that additional noticing is warranted, the entity may defer the item.

Decision-Making Bodies. The ROGC understands that Decision-Making Bodies may receive supplemental reports/evidence that are presented on the day of the hearing. For example, staff or the person appealing the notice of violation may take photos of the property in question on the day of a hearing before the Appeals Hearing Board. Consequently, the ROGC recommends permitting allowances for documents to be submitted on the day of the hearing.

Table 3: Posting Requirements for Supplemental Staff Reports

Meeting Requirements	Council and RDA	Council Committees	Decision-Making Bodies (Quasi-Judicial)	Boards, Committees Commissions	Other Advisory Entities
5. Supplemental Staff Reports	Informational Anytime; Substantive Changes: Exceptions may be requested from Rules if within Brown Act	Informational Anytime; Substantive Changes: Committee may hear and act on the item; or defer it	When necessary, presented at the Evidentiary Hearing	Informational Anytime; Substantive Changes: Committee may hear and act on the item; or defer it	No posting requirement

Memos from Members of the Body (Table 4)

City Council and Board of the SJRA. The ROGC accepted the Task Force's recommendation requiring 4-day advance posting of memos signed by more than one member of the Council or the Board of the SJRA. The Committee differed from the Task Force, however on the issue of limiting the number of Councilmembers who could sign a memo. The Task Force recommended that no more than two Councilmembers be allowed as signatories to these memos. The ROGC was concerned that limiting the signatories to two could potentially reduce disclosure of those who may have actually participated in discussions. In other words, since the Brown Act permits some limited discussion of issues over which the entity has jurisdiction as long as the number of members participating is less than the majority, it would be possible for as many as 5 Councilmembers to participate in discussions. The ROGC was concerned that limiting the number of signatories to two would therefore result in less disclosure by preventing the other 3 Councilmembers from signing the memo and disclosing their participation. In addition, the ROGC recommends that while memos from individual members of the body should be discouraged if submitted with less than 4 days notice, such memos should not be prohibited. The ROGC was concerned that prohibiting the distribution of memos within four days of a meeting would prevent Councilmembers from providing written copies of proposed motions.

Council Committees and Boards, Committees and Commissions. The ROGC recommendations on memos from members of a Council Committee or Boards, Committees and Commissions are the same as for memos from members of the Council and the Redevelopment Agency: 4 days advance posting for memos with multiple signatures; a memo from an individual members is allowed at any time but discouraged if submitted with less than 4 days of notice.

Table 4: Posting Requirements for Memos from Member(s) of the Body

Meeting Requirements	Council and RDA	Council Committees	Decision-Making Bodies (Quasi-Judicial)	Boards, Committees Commissions	Other Advisory Entities
6. Memos from Member(s) of the Body	Multiple signatures 4 days Single signatures anytime but discouraged if ≤ 4 days	Multiple signatures 4 days Single signatures anytime but discouraged if ≤ 4 days	NA	Multiple signatures 4 days Single signatures anytime but discouraged if ≤ 4 days	No distribution deadline

Posting of Agendas for Special Meetings (Table 5)

The ROGC initially adopted the Task Force recommendation requiring 4-day advance posting of Agendas for Special Meetings. Recent events have shown, however, that this recommendation could be problematic. An urgent item concerning the City's bond insurers' recently required a special Council meeting with just two days notice and highlights the organization's need to respond more quickly to emergencies than 4-day posting allows. Staff returned this item to the ROGC for reconsideration and 24 hours posting was accepted for all entities, as long as two-thirds of the members of the entity acknowledge that the matter must be resolved sooner than 4 days. This is consistent with the Brown Act.

Table 5: Posting Requirements for Special Meeting Agendas

Meeting Requirements	Council and RDA	Council Committees	Decision-Making Bodies (Quasi-Judicial)	Boards, Committees Commissions	Other Advisory Entities
7. Agenda Posting (Special Meeting)	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	24 hours

Video and Audio Recording and Public Testimony (Table 6)

Council and Board of the SJRA. The ROGC accepted the Task Force's recommendation to video record Council and Board of the SJRDA meetings and to maintain the recordings for two years. Note: current practice exceeds the Task Force's recommendation, and meetings will continue to be video-recorded and streamed live on the Internet and Cable TV.

Council Committees. The ROGC accepted the Task Force's recommendation to video record ROGC meetings and to audio record other Council Committees and to maintain the recordings for two years. Note: Current practice exceeds the Task Force's recommendation and Council Committee meetings will continue to be video-recorded and streamed live on the Internet and Cable TV.

Boards, Committees and Commissions. The ROGC accepted the Task Force's recommendation to video broadcast the Planning Commission's meetings but decided not to recommend that Elections Commission meetings be video-recorded. The ROGC elected not to record the Elections Commission because, among other things, the Elections Commission must schedule meetings quickly when it receives a complaint, and the City can only videotape meetings in the Committee rooms and Council Chambers, both of which are frequently booked. The ROGC did adopt the Task Force's recommendation that all Board, Committee and Commission meetings be audio-recorded and that those recordings be maintained for two years. Other Advisory Entities will follow the Brown Act, which does not require recording.

Public Testimony. While the Task Force recommended a proscriptive process for allowing certain groups more time for public comment, the Committee determined that the length of public testimony at public meetings for all of the entities considered should be "at the Chair's discretion," consistent with current practice. The ROGC noted that the Chair "may make allowance for high interest items" to address the Task Force's goal of permitting extended testimony.

Table 6: Video and Audio Recording and Public Testimony

Meeting Requirements	Council and RDA	Council Committees	Decision-Making Bodies (Quasi-Judicial)	Boards, Committees Commissions	Other Advisory Entities
8. Recording	Video record and maintain for 2 years	Video record and maintain for 2 years	Video record Planning Commission; audio record all others	Audio record and maintain for 2 years	May audio record but not required
9. Public Testimony	At Chair's discretion; May make allowance for high interest items	At Chair's discretion; May make allowance for high interest items	At Chair's discretion; May make allowance for high interest items	At Chair's discretion; May make allowance for high interest items	At Chair's discretion; May make allowance for high interest items

Meeting Minutes (Table 7)

Types of Meeting Minutes. The 4 types of minutes used in the City are defined as follows:

- a) Synopsis – includes actions only;
- b) Action Minutes – includes motions/actions, public comments noted either “for” or “against;”
- c) Summary Minutes – includes motions/actions, a summary of the legislative body’s discussion and public comments; and
- d) Verbatim Minutes – includes every word spoken.

City Council and Board of the SJRA. The ROGC did not accept the Task Force recommendation that draft minutes be provided 10 days after a meeting but chose to recommend that the City Clerk maintain current practice: a Synopsis is posted by the next meeting and Action Minutes are posted as soon as possible. The ROGC considered the complexity of preparing minutes for Council meetings and the fact that the meeting recordings and closed captioning transcripts are available on-line and concluded that current practice provides significant notice to the public.

Council Committees. The ROGC recommends that Action Minutes be posted 5 days in advance of the City Council meeting at which the Council Committee meeting will be reported; if the minutes are not posted in time, the entire Council Committee report will be deferred.

Decision-Making Bodies and Boards, Committees and Commissions. The ROGC adopted the Task Force recommendation that draft Action Minutes from meetings of Decision-Making Bodies and City Boards, Committees and Commissions be posted 10 days after the meeting.

Table 7: Requirements for Meeting Minutes

Meeting Requirements	Council and RDA	Council Committees	Decision-Making Bodies (Quasi-Judicial)	Boards, Committees Commissions	Other Advisory Entities
10. Minutes	Synopsis posted by next meeting; Action Minutes ASAP	Action Minutes posted 5 days before meeting at which Council will hear Committee's report; if not posted in time, report will be deferred.	Action Minutes Post within 10 days of holding meeting	Action Minutes Post within 10 days of holding meeting	No requirement

D. NON-GOVERNMENTAL BODIES

Task Force identified certain Non-Governmental Bodies (NGBs) that should be required to make specific reports to a City entity because of the nature of their relationship with the City. The ROGC reviewed the SRTF recommendations and had a number of questions about current

reporting processes; whether the list of nongovernmental bodies is complete; how to define nongovernmental bodies that might not fit the definition but are nevertheless "significant"; whether the dollar amounts called out in the definitions capture all of the organizations that should be included; and whether any new reporting requirements for NGBs will have significant impacts on either the City staff, Committee workload, or nongovernmental bodies themselves. A list of the entities and requirements can be found in Attachment A, page 5. The questions were referred for follow-up to the Non-Profit Strategic Engagement Group, which is tasked with overseeing the City's relationship with its nonprofit partners. This group anticipates returning to the ROGC later in June to address the Committee's questions.

E. CLOSED SESSION

Closed Session Provisions Approved by Council for the Council and Board of the SJRA

On August 21, 2007, the City Council adopted the ROGC's recommendations on several new requirements for Closed Session. Generally, the new provisions require the City and Board of the Redevelopment Agency to (1) describe closed session agenda items as provided in the Brown Act and provide certain additional information; (2) limit discussion on real estate negotiations and amicus briefs; (3) approve in open session certain items discussed in closed session and notice those items consistent with the Public Meetings requirements discussed above; and (4) disclose in open session information about certain topics discussed in closed session. On April 8, 2008, the Council approved two revisions to the new provisions.

The Task Force recommended that these requirements for Closed Session be applied to the other entities that hold closed session: Civil Service Commission, Deferred Compensation Advisory Board, Elections Commission, Federated Employees Retirement Board, Police and Fire Retirement Board and San Jose Arena Authority. The ROGC is recommending that these requirements, as amended by the Council on April 8, 2008, apply to these 6 entities with two exceptions.

First, these entities should not file amicus briefs independent of the City or Board of the SJRA at all. Second, although these entities must obtain open session approval of closed session decisions on real estate negotiations, the approval may be given at an open meeting of a subcommittee of the entity. The ROGC's recommendation recognizes the groups that are permitted to hold closed session do not meet as regularly as the Council and delay in approval could be detrimental to the real estate transaction.

Recording Closed Session

The Task Force recommended that all closed session discussions be audio recorded and that the recordings be made available for disclosure to the public unless the City Attorney certified otherwise. In June of 2007, The ROGC decided to ask the Council whether it wanted to audio record closed session for the purpose of having the recording available to review for possible violations of the Brown Act.

The City Council referred back to the ROGC the question about audio recording closed session and at the same time directed staff to work with the Task Force on developing a protocol about recording closed session. Subsequently, the ROGC rejected the Task Force's recommended protocol that the City Attorney certify closed session recordings because the ROGC believes that the decision to disclose closed session discussions rests with the Council exclusively.

The ROGC then asked that the City Attorney's Office prepare a matrix listing (a) the types of matters that are discussed in closed session, (b) when, if ever, the need for confidentiality might end on those discussions, and, (c) if the recordings were to be disclosed after the need for confidentiality ended, what, if any, information should be redacted. The ROGC also noted that the Council had to decide whether closed session should be recorded either (1) for the purpose of having the recording available to review for possible violations of the Brown Act; or (2) for possible future release. And, in the event that the Council decided that the recordings should be available for possible future release, the ROGC wanted the Attorney's Office to advise whether the Council could decide that recordings would be released on more than a majority vote.

On September 27th, 2007 the City Attorney's Office issued a memo recommending that closed session be recorded only for the purpose of having the recording available to review for possible violations of the Brown Act. (**Attachment D**). The memo also includes a matrix listing the types of matters that are discussed in closed session, when, if ever, the need for confidentiality might end on those discussions, and, if the recordings were to be disclosed after the need for confidentiality ended, what, if any, information should be redacted. The memo also recommended that, in the event that the Council chooses to record closed session for possible future release, disclosure of the discussions be in the form of a transcript, with the appropriate information redacted. Transcription of the recordings will ensure that necessary redaction is accurate and thorough. Finally, to respond to the question about a greater than majority vote, the Attorney's Office advised the ROGC that the Council cannot decide that recordings be released on more than a majority vote, since that requirement would permit less access than is permitted under the Brown Act. The Brown Act permits release of confidential information acquired by being present in closed session only on a majority vote.

The ROGC discussed the September 27th memo from the Attorney's Office and considered recording closed session on litigation and real estate matters and not recording labor and personnel matters. The ROGC decided to send the question about recording closed session to the Council and asked the City Attorney to provide the following additional information: (1) What remedy is available to a closed session participant who believes a Brown Act violation has occurred? (2) What are other communities doing? The Attorney's Office has issued a memo responding to these questions that was distributed separately from this report.

Staff Recommendation on Recording Closed Session. The City Attorney and the City Administration continue to recommend that Closed Session meetings not be recorded in order to preserve the integrity of the closed session process. If the Council chooses to record closed session items, it is recommended that they be recorded only for the purpose of determining whether a Brown Act violation has occurred. In any event, the City Administration strongly recommends that Labor and Personnel items be excluded from any recording requirement.

Pilot Implementation Plan for Public Meetings and Closed Session Provisions

Staff will conduct training sessions for those entities affected by the Public Meetings and Closed Session provisions approved by the Council from July through September 2008. Staff estimates that approximately 10-15 training sessions are required to implement the new requirements, which affect approximately 50 entities and associated staff. Phased implementation will take place from October through December 2008, with the pilot year beginning January 2009.

Throughout the year, staff will track the effects of the pilot program, including impacts on public participation, additional costs, and any unintended consequences. Additionally, staff will report back on any change in the response to the Citywide Survey question regarding public confidence in the openness of San Jose City government: As of November 2007, 35% of City residents were very or extremely confident that it operated in a way that was open and accountable to the public. Staff will return to ROGC as needed for input on specific policy or resource issues identified during the pilot. It is anticipated that staff will return with a review of Public Meeting and Closed Session Provisions in early 2010.

POLICY ALTERNATIVES

Not applicable.

PUBLIC OUTREACH/INTEREST

- ☐ **Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- ☐ **Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- ☐ **Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

The work of the Sunshine Reform Task Force has been well-publicized in the community. In addition to coverage by the local media, an early advertising campaign invited suggestions from the community and over 50 reform proposals were received. All meetings are televised and all documents are available online.

Staff held two public meetings in July 2007 to seek input from the City's Boards, Committees and Commissions, as well as to a number of non-governmental bodies that contract with the City. Outreach for these meetings was accomplished through direct contact with the affected entities as well as advertisements placed in local newspapers.

Staff has posted all Task Force agendas and meeting minutes on the City's website and has regularly notified those who have requested notification by e-mail of the Task Force meetings.

COORDINATION

The preparation of this staff memo was coordinated with the City Attorney's Office, the City Clerk's Office, the Redevelopment Agency, the departments of Parks, Recreation and Neighborhood Services, Housing, Planning, Building and Code Enforcement, the Office of Economic Development, and the City Manager's Office.

FISCAL/POLICY ALIGNMENT

Not applicable.

COST SUMMARY IMPLICATIONS

To address the new requirements coming out of the Open Government Requirements for Public Meetings, the 2008-2009 proposed budget includes \$25,000 to create a pool of 5 digital recording systems for use in audio-recording all meetings of Decision-Making Bodies (Quasi-Judicial) and Boards, Commissions and Committees.

The pilot implementation program will allow staff to identify additional resource issues, if any, associated with these Open Government proposals, but it is anticipated that any new costs associated with Phase I, aside from the recording systems above, will be absorbed by the organization.

CEQA

Not a project.



TOM MANHEIM
Director of Communications

For questions please contact Eileen Beaudry, Project Manager, at 408-535-8123.

Attachments:

- A. Lists/Definitions of Entities Affected by Open Government Requirements
- B. Definition of Agenda Packet
- C. Matrix of Public Meeting Requirements
- D. CAO Memo and Matrix on Closed Session

Attachment A

Entities Affected by Open Government Requirements*

Decision-Making (Quasi-Judicial) Bodies

Types of Administrative Hearings of the Decision-Making Bodies

- 1. Appeals Hearing Board**
 - a. Nuisance Abatement Appeals
 - b. Relocation Appeals
 - c. Code Enforcement Appeals
 - i. blighted conditions
 - ii. illegal building activity
 - iii. unsafe and unsanitary living conditions
 - iv. abandoned, dismantled and inoperative vehicles
 - v. neglected vacant houses
 - vi. weed abatement liens; garbage liens
 - vii. sign removal fees; graffiti abatement fees
 - viii. utility billing
- 2. Civil Service Commission** - Disciplinary Hearings; Hear Appeals to Performance Evaluations or Appraisals; Hear Protests To Exam Questions (Fire/Police)
- 3. Deferred Compensation Advisory Committee**
Applications for Withdrawal for Unforeseeable Emergencies
- 4. Elections Commission** - Hearings on Violations of Title 12 of SJ Municipal Code
- 5. Federated Employees Retirement Board**
Applications for Disability Retirement and Applications for Change in Status
- 6. Police and Fire Retirement Board**
Applications for Disability Retirement and Applications for Change in Status
- 7. Independent Hearing Panel (Local Enforcement Agency)**
Enforces State solid waste laws and regulations; Acts on behalf of the State
- 8. Planning Commission**
Appeals of the Director of Planning, Building and Code Enforcement's decision on:
 - a. Site Development Approvals
 - b. Planned Development Permits
 - c. Special Use Permits
 - d. Variance Determinations
 - e. Development Exceptions
 - f. Tree Removal Permits on Private Property
 - g. Single Family House Permits
- 9. Traffic Appeals Commission**
 - a. Appeals from orders of City Traffic Engineer RE citizen requests for traffic control devices
 - b. Issues decisions to City Traffic Engineer RE installation of stop signs at street intersections

*In addition to the entities listed in this attachment, the proposed meeting requirements apply to City Council, the San Jose Board of the Redevelopment Agency and Council Committees

Attachment A

Entities Affected by Open Government Requirements*

City Boards, Committees and Commissions

1. Advisory Commission on Rents
2. Airport Commission
3. Airport Noise Advisory Committee
4. Arts Commission
5. Bicycle and Pedestrian Advisory
6. Council Salary Setting Commission
7. Coyote Valley Task Force
8. Disability Advisory Committee
9. Domestic Violence Advisory Board
10. Downtown Parking Board
11. Early Care and Education Commission
12. Envision San Jose 2040 General Plan Update Task Force
13. Healthy Neighborhoods Venture Fund Advisory Committee
14. Housing & Community Development Advisory Committee
15. Human Rights Commission
16. Library Bond Oversight Committee
17. Library Commission
18. Library Parcel Tax Oversight Committee
19. Mayor's Gang Prevention Task Force - Policy Team
20. Mobile Home Advisory Commission
21. Park Bond Oversight Committee
22. Parks and Recreation Commission
23. Project Diversity Screening Committee
24. Public Safety Bond Citizen Oversight Committee
25. San Jose Arena Authority
26. San Jose Beautiful
27. San Jose/Santa Clara Treatment Plant Advisor Committee
28. Senior Citizen Commission
29. Small Business Development
30. Sunshine Reform Task Force
31. Work2future
32. Youth Commission

*In addition to the entities listed in this attachment, the proposed meeting requirements apply to City Council, the San Jose Board of the Redevelopment Agency and Council Committees

Attachment A
Entities Affected by Open Government Requirements*

Other Advisory Entities

Group 1: Subject to the Brown Act

- **Standing Committees of Boards, Committees and Commissions**
 - **Committees comprised of Council staff that represent a majority of City Council offices**
1. Rules Subcommittee of Airport Commission
 2. Subcommittees of Arts Commission
 - a. Executive Committee
 - b. Airport Art Program Oversight Committee
 - c. Programs Committee
 - d. Public Art Committee
 3. Council Assistants Meeting
 4. Disability Advisory Committee of the Whole
 5. Nominating and Executive Subcommittees of Early Care and Education Commission
 6. Design Review Subcommittee of Historic Landmarks Commission
 7. Subcommittees of Human Rights Commission
 - a. Public Safety Committee
 - b. Outreach Committee
 - c. Liaison to Youth Commission
 8. Executive Subcommittee of Parks and Recreation Commission
 9. Rules and Open Government Council Assistants Meeting
 10. Health & Safety, and, Housing & Human Services Subcommittees of Senior Citizens Commission
 11. Subcommittees of Sunshine Reform Task Force
 - a. Public Records Subcommittee
 - b. Ethics and Conduct Subcommittee
 - c. Technology Subcommittee
 - d. Administration and Accountability
 12. Subcommittees of Work2future
 - a. Executive Committee
 - b. Finance Committee
 - c. Operations Committee
 - d. Youth Council Committee
 13. Executive & Policy Subcommittees of Youth Commission

*In addition to the entities listed in this attachment, the proposed meeting requirements apply to City Council, the San Jose Board of the Redevelopment Agency and Council Committees

Attachment A
Entities Affected by Open Government Requirements*

Other Advisory Entities (OAE's)

Group 2: Required to be Open to the Public and Not Subject to the Brown Act

An entity falls into Group 2 if it meets either of the following:

- It is created by and to advise, solely on matters concerning the conduct of the public's business, the Mayor, the Mayor's Chief of Staff or Budget and Policy Director, a Councilmember, a Council Appointee, or any member of a Board, Commission or Advisory Committee. This definition is not intended to include groups that advise elected officials solely on political or campaign related matters that do not relate to the conduct of the public's business. OR
 - It grants or advises any group subject to the Brown Act about grants of City or RDA funds of \$200K or more per fiscal year to a non-City organization
1. Community Action and Pride Grant Program Evaluation Panel
 2. San Jose Beautiful
 - a. Daffodil Planting Program
 - b. Earth Balloon
 - c. Neighborhood Beautification Awards

Group 3: NOT Required to be Open to the Public and Not Subject to Brown Act

An entity falls into Group 3 if it meets either of the following:

- It is formed or used for specific or immediate problems and not intended to meet for more than 6 months; OR
 - Its meetings include discussion about private or non-public information, where the *public interest served by NOT disclosing the information* clearly outweighs the public interest served by disclosure of the information.
1. Independent Police Auditor's Advisory Committee
 2. Mayor's Gang Prevention Task Force, Technical Team (Panel for Distributing BEST funds)

*In addition to the entities listed in this attachment, the proposed meeting requirements apply to City Council, the San Jose Board of the Redevelopment Agency and Council Committees

Attachment A

Entities Affected by Open Government Requirements*

Non –Governmental Bodies

Note: Open Government requirements for NGB's are not being recommended at this time. ROGC has referred discussion of NGB's to the Non-Profit Strategic Engagement Group.

Sunshine Reform Task Force Definition of Non Governmental Bodies:

- A. The contractor operates or fully maintains any community center or City facility with a value of over \$5M; OR
- B. Contractor receives, per FY from City or RDA, at least the amount of the CMO's contract authority set forth in City Code (\$250K); and provides direct services defined as: *Police, Fire, Sewage Treatment & Water Utility, Garbage Collection, Street Maintenance or Library Services*

Group A NGB's

- 1 Catholic Charities of Santa Clara County
- 2 San Jose Repertory Theater
- 3 San Jose Stage Company
- 4 AMPCO
- 5 Central Parking Systems
- 6 Dolce International
- 7 Logitech Ice/Silicon Valley Sports and Entertainment
- 8 Palace Entertainment
- 9 Los Lagos Golf Course LLC
- 10 San Jose Golf LLC
- 11 Mike Rawitser Golf Shop
- 12 River Street Development Group
- 13 San Jose Giants
- 14 Arena Management Corporation
- 15 Children's Discovery Museum of San Jose
- 16 History San Jose
- 17 Mexican Heritage Corporation
- 18 San Jose Museum of Art
- 19 Team San Jose
- 20 Tech Museum of Innovation

Group B NGB's

- 1 GreenWaste Recovery
- 2 GreenTeam of San Jose
- 3 California Waste Systems
- 4 Garden City Sanitation
- 5 Universal Maintenance
- 6 Bond Black Top
- 7 Goodwill
- 8 San Jose Conservation Corps

*In addition to the entities listed in this attachment, the proposed meeting requirements apply to City Council, the San Jose Board of the Redevelopment Agency and Council Committees

Attachment A
Entities Affected by Open Government Requirements*

NGB's Needing Further Discussion

- 1 SJ Downtown Association (BID)/Downtown PBID/Hotel BID/WG BID/Japantown BID
- 2 Convention & Visitors Bureau
- 3 Taxi San Jose
- 4 Police Athletic League

*In addition to the entities listed in this attachment, the proposed meeting requirements apply to City Council, the San Jose Board of the Redevelopment Agency and Council Committees

Attachment B

Definition of Agenda Packet

- A. "Agenda packet" means agendas of meetings and any other documents that have been or are intended to be distributed to a body that is subject to the Brown Act in connection with a matter anticipated for discussion or consideration at a public meeting.
- B. The agenda packet distributed with the agenda must include:
 - 1. Any memorandum pertaining to a matter to be considered at the meeting, (with 9 exceptions listed in section E)
 - 2. Any contract in substantially final form.
 - 3. Any ordinance, except those relating to an appropriation, in substantially final form.
 - 4. Any resolution, except those relating to appropriation-related funding sources or giving authority to negotiate and/or execute contracts, in substantially final form.
 - 5. The report of any outside consultant pertaining to a matter to be considered at the meeting.
- C. Any document provided to a body that is subject to the Brown Act must be included in the agenda packet that is available for public inspection and copying in the Office of the City Clerk during usual business hours. If a document distributed or intended to be distributed in connection with a matter on the agenda is less than fifteen pages, it may also be available on the City's website.
- D. The agenda packet need not include:
 - 1. Any material exempt from public disclosure under this chapter;
 - 2. Presentation and/or discussion materials including handouts used at a meeting of the body.
- E. The following documents need NOT be distributed on the agenda packet but will be distributed as soon as possible.
 - a. The following staff memos:
 - i. Planning Commission action where there was no significant change to the project description provided in the exhibit memo;
 - ii. Contract Bid Awards or procurement contracts where the initial memo was already distributed;

Attachment B

- iii. Supplemental memos where additional information has been received after the initial memo was released;
 - iv. Emergency items that may need to be added to the agenda to preserve public welfare (i.e., health, safety and financial matters) and that need immediate Council action;
 - v. Grant application memos where the Administration needs Council authority to submit applications and grant deadlines do not allow conformance with the 10-day requirement;
 - vi. Council Committee minutes and Council Committee packets, which will be distributed 7 days in advance of a meeting;
 - vii. Items where Council action is required to satisfy a legal deadline;
 - viii. Items heard by a Council Committee that require full Council action such as:
 - 1. Emergency repair funding;
 - 2. Appointments to boards, commissions, committees and other bodies when a timely appointment is needed;
 - 3. Approval of the City's position on legislation, if a timely response is necessary; and
 - 4. Implementation of arbitration decisions and approval of tentative labor agreements.
 - ix. Reports regarding the second reading of an ordinance, provided that no substantial/material changes have been made from the first reading of a proposed ordinance.
- b. Memos prepared by members of the body for which agenda is being distributed.

PRACTICE POINTER: To the extent possible, every page of a draft document should state that the document is a draft and advise any person seeking a final version of the document to contact the City Clerk's Office at a particular phone number and/or email address. In addition, every Agenda should note that documents attached to or referenced in the Agenda may not be final documents and that final documents may be obtained by contacting the City Clerk's Office at a particular phone number and/or email address.

Attachment C

Matrix of Public Meeting Requirements

Meeting Requirements	Council and SJRA	Council Committees	Decision-Making Bodies (Quasi-Judicial)	Boards, Committees Commissions	Other Advisory Entities
1. Agenda Posting (Regular Meeting)	10 days; exceptions may be requested from Rules if within Brown Act	7 days in advance; 5 days for Rules	7 days* amended agendas allowed if within Brown Act	7 days	3 days
2. Staff Reports	10 days; exceptions may be requested from Rules if within Brown Act	7 days in advance; 5 days for Rules	7 days	7 days	No posting requirement
3. Staff Reports Expenditures of \$1M or More	14 days; exceptions may be requested from Rules if within 10 days	7 days in advance; 5 days for Rules	NA	7 days	NA
4. Cost Benefit of Public Subsidy (\$1M or More)	Info Memo 28 days; Staff Reports 14 days	7 days in advance; 5 days for Rules	NA	7 days	NA
5. Supplemental Staff Reports	Informational Anytime; Substantive Changes: Exceptions may be requested from Rules if within Brown Act	Informational Anytime; Substantive Changes: Committee may hear and act on the item or defer it	When necessary, presented at the Evidentiary Hearing	Informational Anytime; Substantive Changes: Committee may hear and act on the item or defer it	No posting requirement
6. Memos from Member(s) of the Body	Multiple signatures 4 days Single signatures anytime but discouraged if ≤ 4 days	Multiple signatures 4 days Single signatures anytime but discouraged if ≤ 4 days	NA	Multiple signatures 4 days Single signatures anytime but discouraged if ≤ 4 days	No distribution deadline
7. Agenda Posting (Special Meeting)	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	24 hours
8. Recording	Video record and maintain for 2 years	Video record and maintain for 2 years	Video record Planning Commission; audio record all others	Audio record and maintain for 2 years	May audio record but not required
9. Public Testimony	At Chair's discretion; May make allowance for high interest items	At Chair's discretion; May make allowance for high interest items	At Chair's discretion; May make allowance for high interest items	At Chair's discretion; May make allowance for high interest items	At Chair's discretion; May make allowance for high interest items
10. Minutes	Synopsis posted by next meeting; Action Minutes ASAP	Action Minutes posted 5 days before meeting at which Council will hear Committee's report; if not posted in time, report will be deferred.	Action Minutes; Post within 10 days of holding meeting	Action Minutes; Post within 10 days of holding meeting	No requirement

*Not required to specify "Recommended Action" on agendas or list all documents for each item.



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: RICHARD DOYLE
City Attorney

SUBJECT: CITY ATTORNEY'S RESPONSE
TO REFERRAL DATED
AUGUST 29, 2007 FROM RULES
AND OPEN GOVERNMENT
COMMITTEE

DATE: September 27, 2007

BACKGROUND

The Sunshine Reform Task Force issued its Phase I Report and Recommendations in May, 2007. The Phase I Recommendations include provisions that all closed session discussions be audio recorded and that the recordings be made available unless the City Attorney certifies otherwise. The Task Force's recommendations also provide that the City Attorney may certify closed session recordings only if he or she makes a specific finding that the public interest in non-disclosure outweighs the public's interest in disclosure.

The Rules and Open Government Committee began reviewing and discussing the Task Force's Phase I Report and Recommendations at meetings on May 30, June 6 and June 27, 2007.

At its meeting on June 27, 2007, the Rules and Open Government Committee did not reach consensus about recording closed session. Consequently, the Committee agreed to ask the Council whether it wanted to audio record closed session for the purpose of having the recording available to review for possible violations of the Brown Act. The Committee also agreed that no action would be taken to record closed session until the Council discusses its intentions and takes some action.

On August 21, 2007, the City Council approved a number of actions related to the Phase I Report and Recommendations for Closed Session and Public Information. The Council referred back to the Rules and Open Government Committee the question about audio recording closed session.

On August 29, 2007, the Rules and Open Government Committee discussed the question about audio recording closed session. The Committee rejected the Task Force's recommendation that the City Attorney certify closed session recordings; the Committee believes that the decision to disclose closed session discussions rests with the Council exclusively. The Committee asked that the City Attorney's Office prepare a

matrix listing the types of matters that are discussed in closed session, when, if ever, the need for confidentiality might end on those discussions, and, if the recordings were to be disclosed after the need for confidentiality ended, what, if any, information should be redacted. In addition, the Vice-Mayor questioned whether producing a transcript of closed session discussions, with sensitive information redacted, would be appropriate.

The Mayor also noted that the Council had to decide whether closed session should be recorded (1) for the purpose of having the recording available to review for possible violations of the Brown Act; or (2) for possible future release. And, in the event that the Council decided that the recordings should be available for future possible release, whether the Council could decide that recordings would be released on more than a majority vote.

ANALYSIS

Attached to this memo is the matrix requested by the Committee.

The Attorney's Office recommends that closed session be recorded only for the purpose of having the recording available to review for possible violations of the Brown Act. As listed in the matrix attached to this memo, closed session discussions include information about very sensitive subjects, including the City's strategy in labor negotiations, litigation and real estate negotiations as well as private information about City employees, Council Appointees and third parties. Release of the recordings would compromise this information, even after the negotiations or litigation has ended. Moreover, the other jurisdictions that record closed session – San Francisco and Milpitas – do so without the intention of releasing the recordings.

In the event that the Council chooses to record closed session for possible future release, the Attorney's Office recommends that disclosure of the discussions be in the form of a transcript, with the appropriate information redacted. Transcription of the recordings will ensure that necessary redaction is accurate and thorough.

Finally, the Brown Act prohibits disclosure of confidential information "acquired by being present in a closed session" "unless the legislative body authorizes disclosure of that confidential information" by a majority vote.¹ The Brown Act permits legislative bodies only to "impose requirements upon themselves which allow greater access to their meetings...."² If the Council decided that recordings could be released only on more than a majority vote, the requirement would permit less access to its meetings. Consequently, we do not believe that the Council may enact any provision that would require more than a majority vote to release closed session information.

¹ Government Code Section 54963.

² Government Code Section 54953.7.

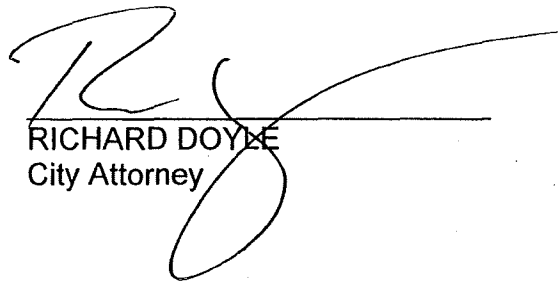
CONCLUSION

The matrix attached to this memo lists the types of matters that are discussed in closed session, when, if ever, the need for confidentiality might end on those discussions, and, if the recordings were to be disclosed after the need for confidentiality ended, what, if any, information should be redacted.

The Attorney's Office recommends that closed session be recorded only for the purpose of having the recording available to review for possible violations of the Brown Act. We believe that release of closed session recordings would compromise information about the City's strategy in labor negotiations, litigation and real estate negotiations as well as private information about City employees, Council Appointees and third parties.

If the Council chooses to disclose closed session recordings when the need for confidentiality has ended, the Attorney's Office recommends that disclosure of the discussions be in the form of a transcript, with the appropriate information redacted.

Finally, we believe that the Council may not enact any provision that would require more than a majority vote to release closed session information.



RICHARD DOYLE
City Attorney

Type of Closed Session Discussion	When Might Confidentiality End?	If Closed Session Discussions Were Disclosed After The Need For Confidentiality Ended, What Should Be Redacted?
Labor		
Direction from Council About Negotiations	Unknown.	All information about the City's strategy in the negotiations.
Litigation and Claims		
Threatened Litigation	When litigation has ended.	1. All private information of employees and third parties; and 2. All information about the City's strategy in the litigation.
Pending Litigation – Status	When litigation has ended.	1. All private information of employees and third parties; and 2. All information about the City's strategy in the litigation.
Pending Litigation – Acceptance of Settlement	When litigation has ended.	1. All private information of employees and third parties; and 2. All information about the City's strategy in the litigation.
Pending Litigation – Rejection of Settlement	When litigation has ended.	1. All private information of employees and third parties; and 2. All information about the City's strategy in the litigation.
Initiation of Litigation	When litigation has ended.	1. All private information of employees and third parties; and 2. All information about the City's strategy in the litigation.
Filing Appeal	When appeal has ended.	1. All private information of employees and third parties; and 2. All information about the City's strategy in the litigation.

Type of Closed Session Discussion	When Might Confidentiality End?	If Closed Session Discussions Were Disclosed After The Need For Confidentiality Ended, What Should Be Redacted?
Writing or Joining Amicus Brief	When appeal has ended.	All information about the City's potential liability in a similar type of litigation.
Claim – Settlement	When claim proceedings have ended.	All private information of employees and third parties.
Claim – Rejection	When litigation has ended or when claims period has expired.	All private information of employees and third parties.
Real Estate		
Purchase	When the property has been transferred.	All information about the City's strategy in the purchase.
Sale	When the property has been transferred.	All information about the City's strategy in the sale.
Eminent Domain	When the property has been transferred.	All information about the City's strategy in the eminent domain proceeding.
Council Appointees – Personnel Matters		
Hiring	When the Appointee has been hired.	All private information of the Appointee and third parties.
Firing	When the Appointee has been fired.	All private information of the Appointee and third parties.
Evaluation	When the evaluation has been completed.	All private information of the Appointee and third parties.
Discipline	After the exhaustion of administrative remedies, if any.	All private information of the Appointee and third parties.